Issue: Benefits – Leave (annual/personal); Hearing Date: 12/17/13; Decision Issued: 01/05/14; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No. 10224; Outcome: No Relief – Agency Upheld.

## COMMONWEALTH OF VIRGINIA
**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## DECISION OF HEARING OFFICER
**In the matter of: Grievance Case No. 10224**

**Hearing Date: December 17, 2013**
**Decision Issued: January 5, 2014**

### PROCEDURAL HISTORY

On March 12, 2013 Grievant filed grievance for being sent home from work by the Virginia Department of Transportation ("Agency") on March 5, 2013 with no notice. Grievant requested the relief of, "To be able to return to work. And have my vac. and personal time used returned to me."

Matters proceeded through the grievance steps and, when matters were not resolved to the satisfaction of Grievant, the matter was qualified for a Hearing by Agency Head on 10/21/13. Hearing Officer was appointed by the Department of Human Resources Management effective November 25, 2013. A pre-hearing telephone conference was held on November 25, 2013. Grievance Hearing was held on December 17, 2013 at Agency Facility.

### APPEARANCES

Grievant (who also was a witness)
Agency Presenter
Agency Party Designee: HR Analysis (who was also a witness)
Other Witnesses: Supervisor
Transportation Operator #1
Transportation Operator #2
Assistant Residence Administrator

### ISSUES

1. Whether Agency improperly sent Grievant home from work without notice on March 5, 2013?
2. Whether Grievant's vacation and/or personal leave utilized should be restored?
3. Whether Grievant was subject to unfair/unequal treatment by Agency?

### BURDEN OF PROOF

Grievant is charged with presenting his evidence first and must prove his claim by a preponderance of the evidence. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.[1]

[1] *Grievance Procedure Manual*, Office of Employment Dispute Resolution, Dept. of Human Resources Management, §5.8 and §9.

## FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

01. Grievant is a Transportation Operator II and has been employed by Agency approximately 17 years. Grievant's job requires a Class A. Commercial Driver's License ("CDL") and his duties involve the operation of hazardous equipment. Grievant is required to maintain a CDL and meet ongoing medical and safety CDL requirements, including requirements related to medications. [2]

02. Grievant has chronic low back issues and is prescribed medications, including pain medication. Grievant was on disability in the summer of 2012 and returned to work in September of 2012[3]

03. In October/November of 2012 Grievant approached Supervisor. Grievant was concerned medications could stay in his system for up to 72 hours. He asked Supervisor if something happening at work and medications were still in his system would there be any consequence. Grievant indicated he would not take medications at work or before work but he was prescribed Percocet and two or three other medications. Supervisor stated he didn't know but would ask about this. Grievant then informed Supervisor he didn't want to cause trouble and not to ask. In December Supervisor eventually went to discuss this matter with management having safety concerns.

04. After Supervisor discussed his conversation with Grievant, a meeting was scheduled with Grievant. On 1/4/13 Grievant, Supervisor, and Assistant Residency Administrator met and discussed matters and whether prescription medications might impact Grievant's ability to perform his duties at work safely. During this meeting Agency understood Grievant volunteered the he was taking/prescribed 5 medications, namely: Vicodin, Zanaflex, Hydrocodone, Oxycodone, and Percocet. Grievant further indicated he does not take medication during his work hours and only at night.[4]

05. At the 1/4/13 meeting, after discussions of medication matters, management told Grievant he would need a written clearance from his Doctor stating his fitness to perform his job while using these medications. Grievant indicated one should have previously been sent, then left to call his Doctor. Grievant returned saying a letter was being faxed in a few minutes. A fax letter was received from Grievant's Doctor about fifteen minutes later and, at the end of the meeting, Grievant was allowed to return to work as it was felt he had furnished the information requested.[5]

06. Subsequent to the 1/4/13 meeting a review of the document faxed on 1/4/13 by Grievant's Doctor gave rise to Agency concerns that the faxed document was addressing the return to work in September of 2012 and concern was raised that Doctor's 1/4/13 faxed letter did not indicate what medication Grievant was taking. Agency determined it needed documentation if Grievant was taking the 5 medications he named on 1/4/13 or needed documentation as to what medications Grievant was taking.[6]

07. On February 19, 2013 Agency faxed a letter to Grievant's Doctor indicating Grievant was released to return to full duty, no restrictions, on September 17, 2012 and further indicating Grievant recently informed Agency he is taking:

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[2] A. Ex. pg. 4.
[3] A. Ex. pg. 11.
[4] A. Ex. pg.4 and testimony.
[5] Testimony.
[6] A. Ex. pg. 9 and testimony.

“Vicadin (for pain) – stated his prescription ended in December 2012
Zaniflex – muscle relaxer
Hydrocodine – for pain
Oxycodine – for pain
Percocet – for pain”.

The 2/19/13 letter noted the Doctor’s statement in his 1/4/13 letter that “Prescribed pain medication should not interfere with ability to drive at work as patient does not take them before or while working”. Grievant’s Doctor was asked to verify and clarify that Grievant is taking the listed medications and the letter stated the Agency’s intent to consult with the physician performing VDOT’s CDL physicals to ensure that Grievant can continue to operate hazardous equipment. The letter noted Agency was seeking further guidance that the medications Grievant was taking are acceptable for CDL holders under federal regulations. Grievant’s Job Description and Job/Task list were also provided the Doctor in this letter.[7]

08. A copy of the Agency’s February 19, 2013 letter that was faxed to Grievant’s Doctor was mailed to Grievant. Grievant indicated he received the letter on March 2, 2013.[8]

09. Management faxed the letter of 2/19/13 to Grievant’s Doctor and subsequently made two follow up calls to Grievant’s Doctor trying to obtain the information requested. Agency’s last follow-up telephone call made on 3/4/13. On the March 4, 2013 follow-up telephone call Agency indicated they would have to send Grievant home if there was no response. Grievant’s Doctor’s Office indicated on 3/4/13, and on the previous follow-up call also, that the Doctor was working on the response. However, Grievant’s Doctor did not respond to Agency’s 2/19/13 letter until 3/8/13 when the faxed letter dated 3/5/13 was received.[9]

10. On March 5, 2013, having not received a response from Grievant’s Doctor to Agency’s letter of 2/19/13, Grievant was sent home from work by Agency. Grievant was allowed to returned to work on 3/13/13 thus being for a sent home for a period of 5 workdays. During such 5 workdays Grievant was on paid leave utilizing his accumulated leave/vacation time.[10]

11. Agency received a letter on Friday, March 8, 2013, from Grievant’s Doctor. This letter from Grievant’s Doctor was dated March 5, 2013 and was faxed to Agency on March 8, 2013. In this letter the Doctor stated Grievant is a patient with chronic low back issues and “Current prescribed medications include Hydrocodone, Oxycodone, and Tizanidine.”

Grievant’s Doctor also provided a follow-up letter dated March 8, 2013, received via fax by Agency on Monday, March 11, 2013, at approximately 5:00 P.M., in which he indicated, “We have been waiting for permission from ***[Grievant]*** to send any documentation your way so that is why the letter has not been sent until recently.” The letter dated March 8, 2013 from Grievant’s Doctor indicated he has again reviewed the 2/19/13 letter and had a chance to talk again with Grievant and review his pain medications and work duties. In this letter Grievant’s Doctor stated, “Current prescribed pain medications are Oxycodone and Tizanidine. The medications are prescribed on an as needed basis.” [11]

[7] A. Ex. pg. 9.
[8] Testimony.
[9] Testimony, A. Ex.
[10] Testimony.
[11] A. Ex. pg. 11-14.

12. On March 12, 2013 Agency Physician notified management that he had reviewed Grievant's Doctor's note and that Agency Physician determined Grievant can perform all safety sensitive duties and operate a commercial/state motor vehicle.[12]

13. On March 12, 2013 Grievant was notified by management he could return to work. Grievant returned to work on March 13, 2013. [13]

14. Grievant's e-mail of 3/5/13 indicated, "I just talked to my doctor the letter that was sent was incorrect. …".[14]

## APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 *et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

Grievant is required to hold a CDL in his job with Agency and his duties include operating hazardous equipment and being around hazardous equipment. He was on disability in the summer of 2012 and returned to work in September of 2012. He has chronic low back issues and has been prescribed medications.

There is no evidence presented alleging Grievant having any issues with the misuse of any medication or drug. Grievant's Doctor noted in his letter dated March 8, 2013 (faxed 3/11/13) that Grievant is prescribed pain medication to be used as needed and he reports he does not take it during or before work. His Doctor further noted that Grievant has always been compliant with directed medical care and there was no reason for him to believe Grievant is not compliant with medical care at this point.[15]

Grievant approached his Supervisor and asked a question which gave rise to management concerns as to medications and possible safety issues. Grievant indicated he was concerned medications could stay in his system for up to 72 hours. He asked Supervisor if something happening at work and medications were still in his system would there be any consequence? Supervisor later discussed the matter Grievant raised with management and management determined they need to investigate matters further.

Management met with Grievant on 1/4/13 to discuss medications and related issues. Agency wanted to determine what medications were being taken by Grievant and if there were any possible safety concerns. At that meeting Grievant was asked to provide a written clearance from his Doctor stating his fitness to perform his job while using the medications in order to return to work. Grievant discussed with

[12] A. Ex. pg. 17.
[13] Testimony.
[14] Agreed Exhibit 1.
[15] A. Ex. pg. 7.

management his prescription medications and addressed him taking the 5 medication (i.e. Vicodin, Zanaflex, Hydrocodone, Oxycodone, and Percocet).

Grievant indicates he presented on 1/4/13 the medication he was prescribed and notes that certain of the 5 medications Agency indicated he took were basically the same (vicodin and hydrocodone being basically the same medication; oxycodone and percocet being basically the same medication).

Management told Grievant he needed a written clearance from his Doctor stating his fitness to perform his job while using these medications. Grievant left the meeting, had his Doctor fax a document, and presented the fax to management at the meeting. This was deemed sufficient at the time for Grievant to return to work. However, testimony indicated that, after later reviewing matters, there was a concern that Grievant's previously provided 9/17/12 return to work letter may have been just edited by the Doctor, dated 1/4/13, and faxed in response to matters discussed in the 1/4/13 meeting.

It appeared to Agency the Doctor's office may have edited a prior document submitted taking the prior release adding the 1/4/13 date and a written notation. Agency needed specific drug names of medications taken and a statement he could return to work and work safely. Management and Safety Division did confer on the need for additional information. Agency was concerned with determining if medication usage would give rise to safety issues for Grievant, his fellow employees, or for the public.

The evidence indicates there were various representations as to what medication and/or the number of medications Grievant might be taking.

- One witness describes Supervisor being in a truck and hearing Grievant discuss with Supervisor taking ***Percocet and two or three other medications***.
- At the 1/4/13 meeting Grievant told management he was taking/prescribed 5 medications: ***Vicodin, Zanaflex, Hydrocodone, Oxycodone, and Percocet.***
- The Doctor's letter dated 3/5/13 (faxed 3/8/13) indicated current prescribed medications "include" 3 medications, ***Hydrocodone, Oxycodone, and Tizanidine.***
- The Doctor's letter dated 3/8/13 (faxed 3/11/13) indicated 2 "current prescribed pain medications", ***Oxycodone and Tizanidine***.

After the 1/4/13 meeting Agency determined it needed to verify and to clarify matters related to Grievant's medications. Agency faxed the February 19, 2013 letter to Grievant's Doctor in an attempt to do so. The letter specifically set forth Grievant's statement of medications made at the 1/4/13 meeting and asked Grievant's Doctor to verify Grievant is taking the listed medications.

The 2/19/13 letter also indicated Agency's intent to consult with the physician performing VDOT's CDL physicals to ensure that Grievant can continue to operate hazardous equipment. It stated they were seeking further guidance that the medications are acceptable for CDL holders under federal regulations and even provided Grievant's job description and job/task list to the Doctor.

Grievant was mailed a copy of the Agency's February 19, 2013 letter to his Doctor and evidence indicated he received it on March 2, 2013.

The Agency was concerned that Grievant's Doctor was not a CDL Physician and was not sure if he was aware of regulatory and other requirements as to a CDL holder. The Agency actively sought his input

and in addition to the 2/19/13 fax of the letter two calls were made to Grievant's Doctor with the last made on 3/4/13. In both calls Agency was told the Doctor was working on a response. The 2/19/13 letter was also re-faxed to the Grievant's Doctor.

Agency expressed concern with balancing fairness and obtaining the need for information related to safety. With no success in obtaining information from Grievant's Doctor Agency determined that Grievant would have to be sent from work. On March 5, 2013, when Grievant was sent home from work, management informed Grievant of multiple attempts to get needed information from his Doctor.

Grievant indicated to HR Analysis that he had on 3/5/13 talked to his Doctor and the information on the letter of 2/19/13 was incorrect. On 3/5/13 both e-mail and telephone conversations discussed the need to get medical information. In the January 4, 2013 meeting Grievant had been told that he was responsible to obtain the medical information needed.

It is noted that Grievant's e-mail of 3/5/13 indicated he had just talked to his Doctor and the Doctor's letter dated 3/8/13 (faxed 3/11/13) to Agency stated Grievant's Doctor had been waiting for permission from Grievant to send any documentation and this is why the letter has not been sent until recently.

Agency indicted that it has discussed with Grievant that he is responsible for presenting medical information. He was required to do so in returning to work in September 2012. In the 1/4/13 meeting he was instructed he had to secure medical information to return to work. Grievant received a copy of Agency's letter 2/19/13 letter on 3/2/13 providing notice to him of issues and questions pending and that Agency was seeking information from his Doctor for a valid business purpose.

Grievant was aware or should have been aware medical information was being requested to clarify his medications, this was sought to determine safety matters, and his ability to operate hazardous equipment was at issue. The 2/19/13 letter notified him Agency considered their request for medical information to be a safety and/or CDL related matter. The letter stated Agency's need to address CDL matters and if Grievant can continue to operated hazardous equipment.

Grievant's Doctor indicated that securing Grievant's release/waiting for permission from Grievant to send any documentation was a delaying factor in his transmittal of requested information to Agency. The evidence indicates that Grievant knew or should have known it was his responsibility to provide the information required by Agency concerning medications and that information was being sought.

Grievant contends that he was treated unfairly and unequally in that others have been allowed to work when issues concerning a CDL arose. He contends that management indicated it would work with another employee as to medicine but would not work with him and contends as other employees with CDL issues/potential issues were allowed to work in the yard he should have not been sent home.

Grievant presented a witness who is also Transportation Operator with a CDL who indicated he had similar medical issues as Grievant and went to the same Doctor as Grievant. Previously the witness inquired if he needed to bring a list of medications when he came back to work from having similar procedures as Grievant. The witness indicated management told him that they would work with him. This statement was presented as indication that there is unfairness and unequal treatment. The evidence indicated both Grievant and such individual were required to present Doctor's statements concerning their ability to resume work for Agency's approval prior to being allowed to return to work.

To find misapplication or unfair application of policy it is necessary to determine whether management violated a mandatory provision of policy, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Looking at the totality of the circumstances there is insufficient evidence to find that Grievant was treated in an unfair or unequal manner.

The evidence indicates that both Grievant's witness and Grievant were required to obtain statements from their physician concerning their return to work and both were required to obtain return to work releases from their Doctor before being allowed to return to work.

Grievant had a return to work letter for resuming work on 9/17/13. Grievant subsequently indicated he was taking 5 medications whose name he provided and had posed a question to his Supervisor asking whether there would be any consequence if something happened at work and medications were in his system. This triggered a concern as to a potential safety matter that management had a duty to investigate matters.

Grievant was aware or should have been aware of ongoing Agency concerns as to medications with anyone holding a job requiring the operation of hazardous equipment and/or having a CDL. Agency did attempt to clarify and resolve matters on a number of occasions prior March 5, 2013.

Grievant's case involved a number of unique circumstances including, as of the time Grievant was sent home on 3/5/13, the following:

- Grievant addressed a question to his Supervisor which raised potential safety concerns.
- On 1/4/13 Grievant stated to management he was taking/prescribed 5 medications.
- The 1/4/13 letter faxed by his Doctor did not indicate medications prescribed but only stated, "Prescribed pain medication should not interfere with ability to drive at work as patient does not take them before or while working."
- The 1/4/13 letter also referenced the return to work of 9/17/12.
- Agency sought verification of the actual medications Grievant was on but not able to secure such information.
- There were no responses to Agency's letter of February 19, 2013 to Grievant's Doctor or their phone calls to him (until the letter dated 3/5/13 and faxed 3/8/13).
- There was still question in management's mind of what exactly were the prescriptions medications Grievant was actually taking/prescribed. This information was required to determine if there were any potential safety issues.

Additionally, Agency tried to clarify matters with a letter and subsequent phone calls to Grievant's Doctor. Grievant's Doctor indicated in his letter dated 3/8/13 that he was held up responding due to securing a release from Grievant.

Agency indicated they were not clear as to Grievant's medications and were concerned with the possibility of up to 5 medications being used/prescribed for Grievant. Only one medication was of concern with other Transportation Operator presented as a witness. The witness was only taking one medication percocet/oxycodone and not the possibly 4 or 5 different medications that Grievant said he was taking.

It is additionally noted that within the 5 medications Grievant provided management in the 1/4/13 meeting some medications listed are basically the same drugs (Percocet and Oxycodone - Hydrocodone and Vicodin).

Grievant's e-mail of 3/5/13 indicated that he had just talked to his Doctor however his Doctor indicated in his letter dated 3/8/13 (faxed 3/11/13) having had to wait for permission from Grievant to send any documentation.

Grievant was informed it was his duty to secure the needed medical information and it was only after extended efforts of Agency to secure the information failed that Grievant was sent home from work. When he was sent home from work on March 5, 2013 this was after he received his copy of the Agency's letter of 2/9/13 which gave him notice of issues.

Agency was concerned about needing to clarify what was being prescribed as this could affect his ability to work safely in any capacity. Taking into consideration the totality of the circumstances involved, there is insufficient evidence to find unequal or unfair application treatment or application of policy.

## CONCLUSION

For the reasons stated above, based upon consideration of the evidence presented at hearing Grievant has not met his burden of proof:

a. There is insufficient evidence to find Grievant was improperly sent home from work without notice on 3/5/13.
b. There is insufficient evidence to find Grievant's vacation and/or personal leave utilized should be returned or restored.
c. There is insufficient evidence to find Grievant was unfairly or unequally treated.

## DECISION

For the reasons stated above, Grievant has not met his burden of proof, and:

1. Grievant is not found to have been improperly sent home from work with no notice on March 5, 2013.

2. Grievant's vacation and/or personal leave utilized should not be returned or restored to Grievant.

3. Grievant is not found to have been subject to unfair/unequal treatment by Agency.

## APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**A. Administrative Review:**

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM

based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and ***received by*** the reviewer within 15 calendar days of the date of the original hearing decision. "***Received by***" means delivered to, not merely postmarked or placed in the hands of a delivery service.

**1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director.** This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR**. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

**B. Final Hearing Decisions:**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR.

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Lorin A. Costanzo, Hearing Officer